Supreme Court, U.S.
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NO. 87-1699

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

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GARY ELLIOTT, et al.,
Appellants,

versus

DR. MARCIAL LEWIN
and
HILLCREST BAPTIST HOSPITAL,
Appellees.

*

On Appeal from the Supreme Court of
the State of Texas

*

APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM AND SUPPLEMENTAL APPENDICES

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App. T: Excerpts from Brief of Appellants (filed in the Texas court of appeals)

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App. V: Excerpts from Amended Petition for Writ of Error (filed in the Texas supreme court)

App. W: Excerpts from Motion for Rehearing and Reconsiderati of Petition for Writ of Error (filed in the Texas supreme court)

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APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM AND SUPPLEMENTAL APPENDICES

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Appellants respectfully hereby respond to Appellees' motions to dismiss or affirm.

I.

The federal questions sought to be reviewed were properly raised in the state courts of Texas.

It is rather surprising that Appellees would so blatantly misstate the record that

was made in the Texas courts. In essence, the Appellees assert that Appellants did not raise any complaint about Rule 215, Texas Rules of Civil Procedure ("TRCP") as written "or as applied" in the Texas trial court, court of appeals or supreme court (pp. 10, 12 of Appellee Hillcrest's motion to dismiss and pp. 4, 5 of Appellee Lewin's motion to dismiss). Such statements are simply incorrect. We are filing, concurrent with this Response, Supplemental Appendices which include excerpts from: Appellants' motion for new trial in the state district court (App. S); brief of Appellants' in the state intermediate appellate court, the court of appeals (App. T); Appellants' motion for rehearing in the court of appeals (App. U); Appellants' petition for writ of error in the Texas supreme court (App. V); and Appellants' motion for rehearing and reconsideration of petition for writ of error in the Texas supreme court (App. W).

Page 5, 6 of App. S, the motion for new trial filed by Appellants in the state

district court, contains the express statements that "[t]he impositon of the drastic sanction of dismissal in the context of this case (a Rule 215 sanctions case) constitutes a violation of the Plaintiffs' due process rights, under ... the Constitution of the United States ..." and further that, quoting from Justice Kilgarlin of the Texas supreme court, the "United States Supreme Court in *Insurance Corp. of Ireland v. Campagnie des Bauxites de Guinee*, articulated due process requirements that seem applicable to discovery sanction orders generally" and that "the sanctions *authorized by Rule 215(2)(b) must be made with these due process concerns in mind.*"

The state district court was required, as mandated by the Texas supreme court in *Downer v. Aquamarine Operators Inc.*, 701 S.W.2d 238, 241 (Tex. 1985), to consider the arguments contained in Appellants' motion for new trial and the matters argued therein are deemed to have been "properly presented" to the state

district court in sanctions proceedings. Thus, the question of the application of Rule 215 was *indisputably* raised in the district court and necessarily rejected by it when it overruled Appellants' motion for new trial (See order overruling motion for new trial, App. D).

Next, Appellants' attack upon the constitutionality of the manner in which rule 215 was applied in this case was expressly, thoroughly and vigorously argued in the Appellants' brief before the state court of appeals, see Point of Error IV and pp. 6, 7, 9-14 of App. T. The constitutional siege continued, contrary to Appellees' assertions, in Appellants' motion for rehearing filed in the state court of appeals, see pp. 3, 4, 6 of App. U. Appellants' petiton for writ of error filed in the state supreme court is exhaustive in its discussion of the constitutional issues vis-a-vis Rule 215, see pp. 3, 6, 8 of App. V,[1] and such issue is likewise raised in Appellants' motion for rehearing filed in the Texas supreme court,

pp. 8, 9 of App. W. In sum, the question of the unconstitutionality of Rule 215, ***as applied in this case***, was clearly raised and rejected in the state district court, the state court of appeals and the state supreme court and we cannot understand why Appellees, in the face of the uncontroverted record, would say differently.

As to the question of the unconstitutionality of the actions of the Texas appellate court in refusing (to the extent that it did so refuse, see discussion *infra*) to consider Appellants' appeal on its merits, contrary to Appellees' assertions that such issue was raised for the first time in the Jurisdictional Statement in this Court, such issue was expressly raised in the Appellants' motion for rehearing in the Texas supreme

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1. For example, the heading (no. 3) on page 39 of App. V states: "Finally, if Rule 215 permits the drastic sanction of dismissal with prejudice to be applied to the facts of this case it (the statute) is unconstitutional."

court (see App. W, pt. (d), p.8).[2]

In any event, the extent to which the constitutional issues were raised in the state courts in this case was far in excess of what this Court has required in similar circumstances. The Court, in ***New York ex rel Bryant v Zimmerman***, 278 US 63 (1928), discussed the requirement that the federal issue must be "drawn into question" in the state court, in these terms:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clearintendment that this was done, the claim is to be regarded as having been adequately presented.

278 US at 67. See also ***Dewey v Des Moines***, 173 U.S. 193, 199 (1899); and ***McGoldrick v. Compagnie Generale Transatlantique***, 309 U.S.

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2. Such issue could not possibly have been raised until in the Texas supreme court because the action complained of did not occur in the trial court but in the intermediate appellate court.

430, 434, 435 (1940) (discussing the "pressed *or* passed upon" test).[3]

Under the parameters outlined in ***New York v. Zimmerman*** and ***Dewey v. Des Moines***, there can be no doubt that Appellants vigorously "pressed", "presented" or "raised" in the state trial court, the intermediate appellate court and the state supreme court the issue of whether Rule 215, "as applied" in this case, was unconstitutional. Recent decisions of this Court clearly support this conclusion.[4]

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3. As we have noted, Appellee Hillcrest's clamor that the constitutional issues relative to Rule 215 were not raised in Appellants' motion for rehearing in the state court of appeals is just simply contrary to the record, see App. U, particularly when the terms of Rule 131, Tex. R. App. P., are considered ("Points will be sufficient if they direct the attention of the court to the error relied upon.").

4. See ***Wood v. Georgia***, 450 U.S. 261, 265 n.5 (1981); ***Three Affiliated Tribes v. Wold Engineering***, 106 S.Ct. 2305, 2309 (1986); ***Pruneyard Shopping Center v. Robins***, 447 U.S. 74, 85, 86 n.9 (1980); ***Eddings v. Oklahoma***, 455 U.S. 104, 113, 114 n.9 (1982); ***Beck v. Alabama***, 447 US 625, 631 n.6 (1980); ***Vachon v. New Hamp- shire***, 414 U.S. 438, 479 n.3 (1984); ***Nat'l Bldg Assn v. Brahan***, 193 U.S. 635 (1904); ***Gomez v. Franscisco Ocasio Perez***,

As to the unconstitutionality of the Texas court of appeals' action in attempting to finesse the Rule 215 issue because no "statement of facts" was filed, since such issue was raised in the Texas supreme court, see p. 8, App. W, this Court has indicated that matters first raised in the state appellate court system are deemed timely raised if the actions complained of did not occur until the case reached the appellate courts. See ***Great Northern Ry. v. Sunburst Oil & Refining Co.***, 287 U.S. 358, 366 (1932); ***Missouri v. Gehner***, 281 U.S. 358, 366 (1932); ***Brinkerhoff Faris Trust & Sv. Co. v. Hill***, 281 U.S. 673 (1930); ***Saunders v. Shaw***, 244 U.S. 317 (1917); and ***Aetna Life Insur. Co. v. Lavoie***, 106 S.Ct. 1480, 1583-84 (1986). Thus, the Appellants' complaints about the actions of the state court of appeals were timely raised and presented.

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409 U.S. 535, 537-539 (1973); ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282, 290 (1921); and ***Cox Broadcasting Corp. v. Cohen***, 420 U.S. 469, 476 (1975)(constitutional issue raised in appellants' "motion for rehearing in the Georgia Supreme Court").

Lastly, the question of the constitutionality of Rule 215 "as written" could possibly come within the scope of the question of the constitutionality of Rule 215 "as applied",[5] see Wright-Miller-Cooper-Gressman, Vol. 16, Sect. 4022, p. 704, and thus be considered just as timely raised as the "as applied" issue.

II.

An appeal is appropriate even where the sole argument is that the statute in question is unconstitutional "as applied", as distinguished from being unconstitutional "as written".

We concede that our attack upon Rule 215 in the state trial, intermediate appellate and supreme courts is more clearly stated in terms of the unconstitutionality of Rule 215 "as applied" to this case (See App. S, T, U and V). But, even if this is so, the Appellees are not entitled to have this appeal dismissed because the cases are legion in which the Court has authorized appeals under 28 U.S.C. 1257 (2) even though the sole

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5. However, an argument that Rule 215 is unconstitutional as written can possibly be discerned from the petition for writ of error filed in the state supreme court. (App. V, pp. 8-11).

federal question is the unconstitutionality of the manner in which a state statute has been "applied" to the facts of that particular case. ***Dahnke-Walker***, 257 U.S. at 288-290;[6] ***Calder v. Jones***, 465 U.S. 783, 788 (1984); ***Japan Air Lines Ltd v. County of Los Angeles***, 441 U.S. 434, 440, 441 (1979); ***R. J. Reynolds v. Durham County***, 93 L.Ed.2d at 459, 460; and ***Ybarra v. Illinois***, 444 U.S. 85 (1976).

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6. The Court stated: "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that, *as to the transaction in question* the Kentucky statute was void, and therefore unenforceable because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but *applied* and enforced the statute. Of course, that was an affimation of its validity when so *applied*. * * * That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid *as applied* to one state of facts, and yet valid as *applied* to another. * * * Our conclusion on the jurisdictional question is that, as *the state court applied* and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so *applied* and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error. * * *". (emphasis ours.)

III.

The federal and constitutional questions presented in the state courts were necessarily decided by the state courts and, to the extent that they were not decided because of state procedural grounds, such state grounds were not independent and adequate.

A. Federal and constitutional issues not only properly presented but also necessarily decided by the state courts.

The crucial issue in this case - whether the trial court's dismissal under Rule 215 was unconstitutional as applied to this case - after being expressly and squarely presented in Appellants' motion for new trial to the trial court, App. S, was necessarily "decided" by the trial court when it summarily denied the motion for new trial, App. D. After such constitutional issue was again squarely presented to the Texas court of appeals, App. T, such court, though obviously attempting to finesse or outright evade the constitutional issue, nevertheless made statements in its opinion that could be construed as a decision on the merits of the constitutional issue. App. C, pp. 4, 5. The

court of appeals there referred to Appellants' "second point ... that the court acted unconstitutionally when it imposed sanctions" (under Rule 215).

Thus, apparently the substantial question of whether it is constitutionally proper to use a sanction rule, such as Rule 215, as a basis for the drastic remedy of dismissal with prejudice "although no order has ever been entered to compel discovery" (which is exactly what happened in this case) ***was at least partially addressed*** by the court of appeals and necessarily rejected by its decision to affirm.

Furthermore, the federal questions of the constitutionality of the trial court's dismissal under Rule 215 and the court of appeals' at least partial refusal to consider Appellants' appeal on its merits, having been raised in the supreme court (App. U, V and W), were necessarily decided and rejected by the supreme court by virtue of its order denying writ of error, App. B, and its order denying a rehearing, App. A.

This Court has articulated the rule that where state court orders or judgments are silent or ambiguous as to the precise basis for their rulings, "[i]n the absence of positive assurance" or a "plain statement" to the contrary from such courts, the Supreme Court will assume that "the merits" of the federal or constitutional issues, having been raised, were decided. ***R. J. Reynolds Tobacco Co. v. Durham County***, 93 L.Ed.2d 448, 460 (1986); ***Michigan v. Long***, 463 U.S. 1032 (1983) (articulating the "plain statement" rule); ***Delaware v. Van Arsdall***, 106 S.Ct. 1431, 1441-1450 (1986); ***New York v. P. J. Video, Inc.***, 106 S.Ct. 960, 963-964 (1986); ***Caldwell v. Mississippi***, 106 S.Ct. 2633, 2638-2639 (1985); ***N.A.A.C.P. v. Claiborne Hardware Co.***, 458 U.S. 886, 102 S.Ct. 3409, 3427 n. 50 (1982); ***In Re Primus***, 436 U.S. 412, 98 SCt 1893, 1905-6 (1978); and ***Old Dominion Branch 496, Nat'l Assn of Letter Carriers v. Austin***, 418 U.S. 264, 282 (1974).

In this case, since there was no "plain statement" by the Texas trial court in

overruling Appellants' motion for new trial, nor by the court of appeals in its decision, nor by the supreme court in its order overruling the petition for writ of error[7] and motion for rehearing, to the effect that the state courts relied solely on state grounds in reaching their decisions, this Court can assume, particularly in view of the ambiguous statement by the court of appeals noted above, that the Texas courts addressed and rejected appellants' contentions that Rule 215, as applied in this case, was unconstitutional and that the action of the court of appeals, in refusing (to the extent that it did so refuse) to consider Appellants' appeal on its merits, was unconstitutional.

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7. This Court has consistently held that the denial of writ of error by a state supreme court constitutes a ruling upon the issues raised in the writ of error. See, e.g., *Atchison T. & S. F. Ry. Co. v. Public U. Commission*, 346 U.S. 346, 348, 349 (1953).

B. Even if the Court should conclude that the Texas court of appeals and the supreme court were basing their decision solely upon the state procedural ground that no "Statement of Facts" was filed in the court of appeals, the Court should still accept jurisdiction because such state procedural ground is "inadequate" under any one of a number of tests employed by this Court.

In our Jurisdictional Statement, pp. 7-25, 45-60, we clearly established that the procedural facts, necessary for the state appellate courts' decision on the merits of Appellants' contention that Rule 215 was unconstitutional as applied in this case, were fully contained in the "Transcript" which *was filed* in the court of appeals and, in any event, there was no disagreement about the essential procedural facts between the parties as reflected in their briefs before the state court of appeals and the supreme court. The court of appeals and supreme court knew full well that there was absolutely no need for a "Statement of Facts" (which is the name of the document that normally contains the testimony of witnesses who testify *at a trial on the merits*) in

order to pass upon the merits of Appellants' point of appeal that Rule 215 was unconstitutional as applied in this case. The utilization of the rationalization by the state appellate courts that they could not decide such issue without a "Statement of Facts" was obviously an unwarranted evasion of the constitutional issue and cannot constitute an "adequate" state ground for avoiding jurisdiction under 1257(2). ***Ancient Egyptian Arabic Order of Nobles of the Mystick Shaine v. Michigan,*** 279 U.S. 737 (1929).

As stated by **Wright-Miller-Cooper-Gressman, *Federal Practice and Procedure***, Vol. 16, Sect. 4021, p. 580, "[i]ndependent state grounds for decision might thwart federal rights as a matter of deliberate evasion, subtle and subconscious evasion, or simply poor judicial performance" if the Supreme Court were not to analyze the vehicle used by a state court to avoid a constitutional or federal issue. Thus, the Court always has jurisdiction to determine

whether a state procedure "is adequate" when it is used as a means of pretermitting the federal or constitutional question. *Fay v. Noia*, 372 U.S. 391 (1963); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Railway Express v. Levee*, 263 U.S. 19 (1923); and *International Longshoremen's Association v. Davis*, 106 S.Ct. 1904, 1910-1913 (1986).

Moreover, as argued by Appellants in the Jurisdictional Statement, the very actions of the Texas appellate courts with regard to the Appellants' appeal on the merits was an unconstitutional violation of the due process and equal protection clauses, Jur. Stmt, pp. 45-52, and this Court has held that where a state procedural ground is utilized in an unconstitutional manner in order to evade a decision on federal questions, such ground cannot deprive the Supreme Court of appellate jurisdiction with respect to the federal questions. *Hord v. Board of County Comrs of Love County*, 253 U.S. 17, 22-23 (1920) and *NAACP v. Alabama ex rel Patterson*, 357 U.S.

449 (1958).[8]

In addition, the Court has rejected a state procedural ground where it seems "novel" or contrary to prior state law. ***NAACP v. State of Alabama ex rel Patterson***, *supra* ("novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, ***in justified reliance upon prior decisions***, seek vindication in state courts of their federal constitutional rights"; 357 U.S. at 457-8). In ***James v. Kentucky***, 466 U.S. 341, 104 S.Ct. 1830, 1835-6 (1984), the Court, in rejecting a state procedural ground as independent and adequate, stated that the law with respect to such ground "is not the sort of firmly established and regularly followed state practice that can prevent implementation of

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8. See also ***Reece v. State of Ga.***, 350 U.S. 85 (1955); ***Bonie v. City of Columbia***, 378 U.S. 347 (1964); ***NAACP v. Alabama ex rel. Flowers***, 377 U.S. 288, 296-301 (1964); ***Terre Haute & Indianapolis Ry. co. v. Indiana ex rel Ketchum***, 194 U.S. 579 (1904); and ***James v. Kentucky***, 466 U.S. 341 (1984), cert den. (1985), 105 S.Ct. 1849.

federal constitutional rights". To the same effect see ***Barr v. City of Columbus,*** 378 U.S. 146 (1964); ***Wright v. Georgia***, 373 U.S. 284, 291 (1963); ***Parrot v. City of Tallahassee***, 381 U.S. 129 (1965) (relating to inadvertent failure to obtain certification of the trial court record) and ***Sullivan v. Little Hunting Park***, 396 U.S. 239, 233-235 (1969) (the Court held that the state court decisions "do not enable us to say that the Virginia court has so ***consistently applied*** its notice requirement as to amount to a self-denial of the ***power*** to entertain the federal claim here presented ....").

In sum, whatever the test, rule or principle applied,[9] the actions of the Texas court of appeals and supreme court, to the extent that they circumvented the federal constitutional issues pertaining to Rule 215, should not be accepted as an adequate state ground and the Appellees' motions to dismiss should be denied.

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9. And there are other reasons which suggest that the state ground in this case was so implausible as to require rejection of it as

IV.

In the alternative, Appellants ask the Court to accept the appeal as a petition for certiorari under 28 U.S.C. 1257(3) and grant certiorari.

The Court has on numerous occasions, when in doubt about jurisdiction under 1257(2), taken it upon itself to consider the jurisdictional statement as a petition for certiorari and then granted certiorari. See, e.g., *Kulko v. California Superior Court*, 436 U.S. 84 (1978), reh den. 98 S.Ct. 3127; *Calder v. Jones*, 465 U.S. 783, 787, 788 (1984) and *Addington v. Texas*, 441 U.S. 418, 422, 423 (1975). In the alternative, we ask the Court to do likewise in this case.

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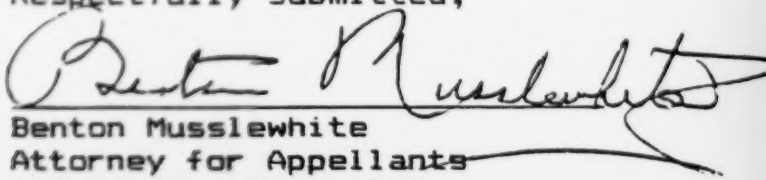
independent and adequate. These include the fact that the Court will not allow the state courts to circumvent federal or constitutional issues through "arid procedural rituals", *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) and *Wright v. Georgia*, 373 U.S. 284 (1963); and the rule that state courts must "afford a reasonable opportunity for asserting federal rights, without placing unreasonable obstacles in the way", Wright-Miller-Cooper-Gressman, Vol. 16, Sect. 4027, pp. 740, *Davis v. Wechsler*, 263 U.S. 22 (1923); *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190 (1925); *National Mutual Bldg & Loan Assn v. Brahan*, 193 U.S. 635 (1904); and *Hathorn v. Lovorn*, 457 U.S. 255 (1982).

WHEREFORE, Appellants pray the Court to deny Appellees' motions to dismiss, accept jurisdiction under 28 U.S.C. 1257(2) or, in the alternative, grant certiorari jurisdiction under 28 U.S.C. 1257(3).

Respectfully submitted,



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APPENDIX S

NO. 85-0701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR	]	IN THE DISTRICT COURT OF McLENNAN COUNTY, TEXAS
vs	]	
DR. MARCIAL LEWIN AND HILLCREST BAPTIST MEDICAL CENTER	]	19TH JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR NEW TRIAL WITH RESPECT TO COURT'S ORDER DISMISSING PLAINTIFFS' CASES PURSUANT TO RULE 215

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiffs in this cause and move the Court for a New Trial, Reconsideration and Reinstatement of this cause of action and for such Motion would respectfully show the Court:

I.

This Court, on June 13, 1986, dismissed this case under the sanctions provided for in Rule 215 T.R.C.P. The Plaintiff would show that the Court erred in dismissing

such case, pursuant to such sanctions rule, for the following good and sufficient reasons:

1. Rule 215, considered together with Rule 166b and the other rules of civil procedure, establish a reasonable cut-off, with respect to Supplementation of Anaswers to Interrogatories, of not less than thirty (30) days prior to trial of the case on the merits. The only issues in question here are the Answer to Interrogatories Nos. 9, 10 and 22. Those supplemental answers were filed on June 13, 1986 wth the exception of the question of other hospitalizations of the Decedent. The surviving husband, who is now in the penitentiary, does not know the answers to that question and therefore it has been to impossible for Plaintiffs' counsel to obtain the answer to that question. Where it is impossible for a Plaintiff to answer a question, the failure to answer such question cannot be the subject of a

dismissal under Rule 215 of any other sanctions rule. Thus, all the answers that could be filed by the Plaintiffs which respect to Interrogatories Nos. 9, 10 and 22, were filed on or before June 13, 1986 and such date was far in excess of thirty (30) days in advance of the trial of this case. Wherefore, it was error to utilize the drastic sanctions of dismissal.

2. The Court failed to utilize sanctions consistent with any purported violation. Assuming that Plaintiffs should have answered Nos. 9, 10 and 22 more fully, the failure to do so on the time schedule set by the Defendants did not justify the drastic sanction of dismissal but, at the most, justified a sanction of imposition of attorney fees. The Court erred in failing to temper the sanction to the purported violation involved. As Judge Kilgarlin of the Supreme Court pointed out in his Article in St. Mary's Law Journal, 15 St. Mary's Law Journal 767, et seq.,

Rule 215 is to be construed so as to bring about, in accordance with Rule 1, the "just adjudication of substantive rights". He points out that the main purpose of the sanctions in Rule 215 is "to insure that the abuser does not profit by his wrong and that his adversary does not suffer by it", id. 774, 775 and that the essential purpose of Rule 215 is to prevent either party from being unduly and unfairly surprised at the trial of the case. Id. @ p. 770. That is the reason that there was written into Rule 166b, as well as into Section 5 of the Rule 215, a thirty (30) day time limit - that is providing all information requested, including answers to interrogatories, supplementation of interrogatories, designation of experts, and the like. The Defendants have now been provided with all the information we can provide in answer to interrogatories Nos. 9, 10 and 22, and such information was provided far more than thirty (30)

days in advance of the trial date.

3. The imposition of the drastic sanction of dismissal in the context of this case constitutes a violation of the Plaintiffs' due process rights, under both the Constitution of the United States and the Texas Constitution. As Judge Kilgralin, in his St Mary's Law Journal Article, noted:

"Even if fair notice and hearing are govern, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, articulated due process requirements that seem applicable to discovry sanction orders in general. *Compagnie des Bauxites*, it is submitted, holds that for a sanction decree to pass constitutional muster *it must be just, and be specifically related to the harm done by the condemned conduct.* The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. *The second standard requires that the remedy for the subject discovery abuse be tailured to redress the resultant prejudice to the other party.* Examination of the sanctions authorized by Rule 215(2)(b) *must be made with these due process concerns in mind."* Id. at pp. 795-796.

Judge Kilgarlin also noted in connection with the drastic sanction of dismissal:

"These sanctions are termed the 'ultimate' or 'extreme' sanctions. *It is settled that, consistent with due process considerations, ultimate sanctions cannot be imposed unless the failure to make discovery is willful, in bad faith or due to some fault of the disobedient party* (citing *Societe Internationale Pour Participations Industrielles vs. Rogers*, 357 U.S. 197, 212 (1958) ... Other circumstances may call for the harsh sanction of final dismissal (or sanctions tantamount to final dismissal; but, in general, any time a trial court contemplates disposal of a lawsuit on procedural grounds rather thanon the merits it *must exercise caution*". id. at pages 800 and 802.

Moreover Judge Kilgarlin stated that the Court should consider "eventual compliance with the rule ... in devising an appropriate order (imposition sanctions)". id. @ p. 804. It is clear that this Court has unduly and unnecessarily, in violation of the due process rights of these Plaintiffs, taken away their right to have their day in court. Even if it be assumed that Plaintiff should have supplemented Answers 9, 10 and 22 in accordance with the schedule set by the Defendants, the

most that this Court should have done, in imposing sanctions, is to assess attorneys fees against the Plaintiff and his attorney for the time expended by the Defendant in preparing their Motion for Sanctions and attending the hearing on sanctions.

4. Also, considering the affidavit filed by Plaintiffs' counsel and the fact that the Plaintiff himself - that is, the surviving husband - is in the penitentiary and the minor is not at this time living with him, such situation constitutes "good cause" for the failure to file answers to Interrogatories nos. 9, 10 and 22 prior to June 13, 1986. Therefore, the Court erred in imposing the drastic sanctions of dismissal.

5. The Court erred in imposing the drastic sanctions of dismissal because it relied upon an affidavit which was filed *the date of the hearing and of which the Plaintiffs and Plaintiffs' lead counsel*

did not have due notice. The Court should have rejected the filing of said affidavit at the last minute and on the date of said hearing, or continued the hearing to a later date. Particularly is this true since Plaintiffs' lea counsel could not be present due to being in trial in another Court. As the affidavit attached hereto reflects, the counsel who handled the matter, Ms. Susan Ashley, was not familiar enough with the file to be able to respond to such affidavit on the spot. It was totally unfair and lacking in due process for the Court to grant the filing of said affidavit on the date of the hearing without giving the Plaintiff a chance to respond and certainly without giving the Plaintiffs' lead counsel a chance to be there in order to respond. Such action of course not only violated the due process rights of the Plaintiffs but constituted an abuse of discretion in going forward on the basis of such an affidavit. Without

such affidavit, the record in this cause is clearly insufficient to justify the imposition of the drastic sanction of dismissal.

6. For other and sufficient reasons, your Plaintiff would show that the Court erred in imposing the drastic sanction of dismissal.

II.

Therefore, Plaintiffs respectfully request the Court to grant a new trial and reinstate.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS pray the Court to grant such new trial and/or reconsideration and reinstatement of this case upon the Docket.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

BY: _____

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
713/222-2288
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for New Trial with Respect to Court's Order Dismissing Plaintiffs' Cases Pursuant to Rule 215 was mailed to all counsel of record, by placing same in U.S. Mail, postage pre-paid on this the 14th day of July, 1986.

_____

Benton Musslewhite

APPENDIX T

NO. 10-86-176-CV

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL
DISTRICT OF TEXAS AT WACO

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR

Appellants

vs.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Appellees

*

BRIEF FOR APPELLANTS

Benton Musslewhite
Law Offices of Benton
Musslewhite, Inc.
609 Fannin, Suite 517
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(713) 222-2288
Attorney for Appellants

POINTS OF ERROR

I.

If the District Court was correct in its apparent view that the answers to the three interrogatories in question were somehow deficient, it nevertheless erred in failing to make a specific determination to that effect, specifying how they were deficient and enter a clear order to compel with an opportunity for Plaintiffs to comply, before utilizing the drastic sanctions of dismissal with prejudice.

POINT OF ERROR

II.

The District Court erred in holding, if it did, that the Plaintiffs had not adequately answered the three interrogatories of which Defendants complained, particularly in view of the undisputed facts that Plaintiff (Gary Elliott) provided all the information within his knowledge and the questions

concerning specific acts of negligence were premature, would be better handled by Defendant's special exceptions and, in any event, were answered to the best of Plaintiff's ability pending the depositions of the Defendant doctor and attending nurses.

POINT OF ERROR

III.

The District Court erred in granting the drastic sanction of dismissal with prejudice because:

(a) It is undisputed that with the Plaintiff Gary Elliott being incarcerated in the State Penitentiary, and the other undisputed facts and circumstance of this case, good cause existed for the delay in answering the Hillcrest interrogatories and the Lewin interrogatories, the latter being almost precisely the same as the Hillcrest interrogatories;

(b) It is undisputed that Plaintiffs made a good faith effort to answer all of the interrogatories to the extent of their

knowledge and considering the fact that the depositions of the Defendant doctor and Hospital nurses had not yet been taken;

(c) It is undisputed that Defendants, who apparently were not satisfied with three of the Plaintiffs' answers to their interrogatories, never did ask the Court to determine whether Plaintiffs' answers were, under the circumstances of this case, actually deficient as they contended, and, if the Court deemed them deficient, to enter a clear order to that effect with a reasonable time given Plaintiffs to comply;

(d) It is undisputed that no prior specific order to compel or to require discovery was ever entered by the Court or ever disobeyed by the Plaintiffs;

(e) The Plaintiff filed responses to the interrogatories, responses to the Defendants' sanctions motions, a motion for new trial and presented testimony at the hearing on the Motion for New Trial,

all indicating reasonable explanations why the three questions of which the Defendants complained could not be more completely answered;

(f) The Defendants alternatively sought, yet the Court never considered, lesser sanctions such as attorneys fees and expenses;

(g) At the very most, the Court should have utilized no greater sanction than dismissal without prejudice;

(h) There was absolutely no evidence of bad faith, contumacious conduct, willfulness or gross negligence on the part of Plaintiffs' counsel or any default or neglect on the part of the individual Plaintiffs; and

(i) There was absolutely no evidence of any prejudice to the Defendants by any delay in answering the interrogatories; the case was not set for trial; Plaintiffs offered to supplement (e.g. re experts) the interrogatories as soon as the

depositions of the Defendant Doctor and the Hospital's nurses were completed and as more information became available; and Plaintiffs offered to sign releases and make themselves and all witnesses, including experts, available for depositions long before the trial would be set.

POINT OF ERROR

IV.

The District Court erred in granting the drastic sanction of dismissal with prejudice in this case because such action violated the constitutional rights of the Plaintiffs under the Texas and U.S. Constitutions, particularly the 14th Amendment of the U.S. Constitution, because such sanction was unjust; was not tempered to the alleged abuse, if any; was applied without any prior evidence or finding of bad faith or contumacious conduct on the part of the Plaintiffs or their attorneys; was applied without any

prior clear warning or order of the Court to the Plaintiffs so as to give them a reasonable opportunity to comply with a court order; and for all the reasons asserted in Point III above.

ARGUMENT AND AUTHORITIES

While in this case we do not take the position that interrogatories 9 and 10 called for irrelevant information, we do point to **General Motors Corporation vs. Lawrence** as an indication that the Supreme Court will not tolerate sanctions or even orders to compel answers to questions of which the answering party has no knowledge. This point is made even more clear by the Supreme Court of the United States. In **Societe Internationale Pour Participations Industrielles vs. Williams P. Rogers, Jr., et al.**, 357 U.S. 197 (1958), the Supreme Court made it clear that a party cannot be compelled - and certainly not sanctioned with respect thereto - to produce information of which

it has no knowledge or over which it has no control. The Court held that even where a party has "constructive control" over information or documents, even though it may be a technical violation of the discovery rules not to produce such information or documents, the drastic sanction of dismissal cannot be employed and to do so would violate the constitutional rights of the party against whom it would be employed. See discussion under IV below. In **Hammond Packing Co. vs. Arkansas**, 212 U.S. 322, sanctions were upheld, but the Court went out of its way to make it clear that sanctions cannot be employed ". . ***for a failure to do that which it may not have been in its power to do***". 212 U.S. at 347; emphasis added.

* * *

The lead case in setting the parameters with respect to utilization of the "ultimate sanctions" is **Societe Internationale vs. Rogers**, supra. The

Supreme Court made explained that not only are there constitutional limitations, see discussion under IV., infra, but that the rule itself, as does Rule 215 of T.R.C.P., is subject to important limitations, to wit:

> "In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfullness, bad faith, or any fault of petitioner, (that is the plaintiff himself)".

* * *

EVEN IF THE COURT IMPOSED SANCTIONS WITHIN THE FRAMEWORK OF RULE 215, SUCH IMPOSITION OF SANCTIONS WAS UNCONSTITUTIONAL

As Judge Kilgarlin stated in 15 St. Mary's Law Journal, 795 and 796:

> "Before imposing sanctions for the violation of any discovery request or order, the non-complying party must be given notice and a hearing. Not only are these safeguards required by Rule 215, but due process also demands that the allegedly derelict party be

> afforded reasonable notice and opportunity to be heard before sanctions are invoked. Even if fair notice and hearing are given, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee articulated due process requirements that seem applicable to discovery sanction orders in general. Compagnie des Bauxites, it is submitted, holds that for a sanction decree to pass constitutional muster it must be just, and be specifically related to the harm done be the condemned conduct. The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. The second standard requires that the remedy for the subject discovery abuse be tailored to redress the resultant prejudice to the other party. Examination of the sanctions authorized by Rule 215 (2) (b) must be made with these due process concerns in mind.

These due process requirements are affirmed throughout the federal court cases and also the Texas cases. See Affanato vs. Muier Brothers, supra; Fisher vs. Marubeni Cotton Corporation (see discussion under headnote 5); Insurance Corporation of Ireland vs. Compagne des Bauxites de Guinee 456 U.S. 694 (1982);

Hovey vs. Elliott, 147 U.S. 407, (1987); Hammond Packing Co. vs. Arkansas, supra, (see discussion under footnote 9); Societe Internationale vs. Rogers, supra; Lueg Tewell, supra; Plodzik vs. Owens Fiberglass Corporation; Phillips vs. Vinson Supply Co., the Court there stating that "we find that the Judge, in not giving notice as required by Rule 168 or providing a hearing concerning the specific nature of the deficiencies and an opportunity to make the necessary corrections, deprived the Appellant of due process and (the Court) abused his discretion in failing to utilize other remedies available to him to assure compliance with the order"; 581 S.W. 2d at p. 792; and Sears Roebuck & Co. vs. Hollingsworth, supra. Indeed, as stated in Insurance Corporation of Ireland vs. Compagne des Bauxites, Rule 37 of the Federal Rules of Civil Procedure establishes the outerlimits of the

constitutional limitation upon sanctions orders. Thus, even if an order complies with Rule 215 of the Texas Rules of Civil Procedure, it violates the due process clause of the Constitution of the United States, if it nevertheless violates Rule 37 F.R.C.P. This becomes important because Rule 37 F.R.C.P., and the cases construing it, mandate that the Court have a hearing on any alleged deficient answers and issue a discovery order prior to issuing any sanctions, particularly the sanction of dismissal with prejudice. Unless such order is issued and violated, the sanction of dismissal with prejudice violates the Constitution, as the cases clearly hold under Rule 37. Therefore, in all probability the statement in Rule 215 that a court can impose even the lesser sanctions, without first issuing such a discovery order, violates the constitution of the United States.

Most certainly, under the applicable law, particularly the Supreme Court decisions, regardless of what the proper construction of Rule 215 is, the order of the District Court in this case violates the constitutional rights of Mr. Elliott and his minor daughter and therefore must be reversed. This is particularly true in view of the undisputed facts that the Plaintiffs attempted to respond to the interrogatories; they gave a reasonable explanation as to why there was a delay in responding; they attempted in good faith to answer all the questions to the best of their ability; the Plaintiffs at no time violated any prior order of the Court; the Court did not issue any order prior to the dismissal; and there was absolutely no prejudice inflicted upon the Defendants by any delay in filing the answers or by the alleged deficiencies in the answers to interrogatories 9, 10 and 22. What the Court below did reminds us of the

oft-quoted and famous statement of Judge Black's dissent in Link v. Wabash, 370 U.S. 648, as follows:

> "When we allow the desire to reduce Court congestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name. . . . Moreover, it seems plain to me that any attempt to cut down on court congestion by dismissing meritorious lawsuits is doomed to fail even in its misguided purpose of promoting speed in judicial administration. Litigants with meritorious lawsuits are not likely to accept unfair rulings of that kind without exhausting all available appellate remedies. Consequently, any reduction of trial court dockets accomplished by such dismissals will be more than offset by the increased burden on appellate courts. This case seems to me an excellent example of the sort of wholly unnecessary waste of judicial resources which can result from such overszealous protection of trial court dockets.

370 U.S. at pp. 648, 649.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, Appellants pray that this cause be reversed and remanded to the

District Court for completion of discovery and trial on the merits.

Respectfully submitted,

By: _____

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA No. 14752000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was mailed and/or hand delivered to all attorneys of record on this the 26 day of , 1986.

_____

Benton Musslewhite

APPENDIX U

NO. 10-86-176-CV

*

IN THE COURT OF APPEALS
FOR THE TENTH SUPREME JUDICIAL DISTRICT
AT WACO, TEXAS

*

GARY ELLIOTT, Individually And
As Next Friend of
SHAUNA MARIE ELLIOTT, A Minor Child,

APPELLANTS,

VS.

DR. MARCIAL LEWIN and
HILLCREST BAPTIST MEDICAL CENTER

APPELLEES.

*

MOTION FOR REHEARING OF APPELLANTS

*

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
713/222-2288

NO. 10-86-176-CV

*

IN THE COURT OF APPEALS
FOR THE TENTH SUPREME JUDICIAL DISTRICT
AT WACO, TEXAS

*

GARY ELLIOTT, Individually
And As Next Friend of
SHAUNA MARIE ELLIOTT, A Minor Child,

APPELLANTS,

VS.

DR. MARCIAL LEWIN and
HILLCREST BAPTIST MEDICAL CENTER

APPELLEES.

*

MOTION FOR REHEARING OF APPELLANTS

COMES NOW, the appellants in the above numbered cause and moves the Court of Appeals for a Rehearing upon their opinion on an Order dated August 13, 1987 and for such Motion would respectfully show the Court:

Your Appellants would respectfully show that the Court of Appeals erred in the following respects:

* * *

V.

The Court of Appeals further erred in failing to decide the question whether or not the District Court had properly tailored the particular sanction used in the case before it. Once again, this Court of Appeals could easily make that determination because it had before it the same record that the District Court had before it, namely the transcript that was before this Court of Appeals. Based upon a review of that transcript it is clear that the District Court did in fact violate the due process rights of the plaintiffs as defined in **Insurance Co. Corporation of Ireland vs. Compagnie-Des Bauxites**, 456 U.S. 694 (1982). After this Court states that it can not determine anything because it has no record before it, it turns right around and states that "the record (apparently before it) reflects that plaintiffs-appellants were given notice of and participated through counsel in the

sanction hearing". If this Court can address the record to make that determinatin, why can it not address the record to determine the other issues which were duly raised by the appellant in this appeal? Therefore, it is clear that when the Court reviewed the record that was before it, being the same record that was before the District Court at the time it made the sanction dismissal, it could only reach one conclusion and that is that the due process rights of the plaintiffs had been indeed completely and utterly violated.

It is clear that we have a situation here, when reduced to its simple essence whereby the plaintiffs answered the interrogatories submitted to them; the defendants complained that three of the interrogatories submitted to them had not been answered completely; the plaintiffs made it clear in supplemental answers and in answers to interrogatories submitted by

a co-defendant that they had answered those interrogatories ot the best of their ability and that they had given all the information that they had in their possession; that the case had not been set for trial; that the Court has not entered any prior order specifically directing the plaintiffs to answer such interrogatories more fully or else be subject to sanctions; the Court had not considered the question of whether or not the answers to the interrogatories were adequate; there was absolutely no showing of prejudice that could be sustained by the defendants by the delay in answering the interrogatories or by the fact that they had not been answered as fully as defendants would like; the defendants had made no effort whatsoever to mitigate any possible prejudice by taking the depositions of the parties or sending out interrogatories to the in-laws of the plaintiff Gary Elliott who was

incarcerated in the penitentiary; the District Court clearly failed and refused to take into consideration that the Plaintiff was incarcerated inhe penitentiary and alienated from the in-laws who had custody of his child; and that there was absolutely no evidence, pleadings, or otherwise, in the record before the District Court, being the same record that was before the Court of Appeals, which would indicate in any way that the plaintiffs or their attorneys were guilty of bad faith or acting willfully. Affirming a dismissal under those circumstances is but a further extensin of the violation of due process and erroneous application of the Rules of Civil Procedure that had been effectuated by the District Court. We respectfully request this Honorable Court to reconsider its decision; to grant a rehearing; and reverse the District Court below and Order this Court restated for completion of

discovery and trial upon the merits.

Respectfully submitted,

THE LAW OFFICES OF BENTON MUSSLEWHITE, INC.

By: _____

Benton Musslewhite
609 Fannin, Ste. 517
Houston, Texas 77002
(713) 222-2288
TBA No. 14752000

APPENDIX V

NO. C-6869

IN THE
SUPREME COURT OF TEXAS

*

GARY ELLIOTT, INDIVIDUALLY
AND AS NEXT FRIED OF
SHAUNA MARIE ELLIOTT, A MINOR CHILD,

Petitioners

VS.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Respondents

*

AMENDED
PETITION FOR WRIT OF ERROR

On behalf of GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR, Appellants in Cause No. 10-86-176-CV in the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco, Texas, wherein GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIED OF SHAUNA MARIE ELLIOTT, A MINOR, are Appellants and Dr. Marcial Lewin and Hillcrest Baptist Medical Center are Appellees.

BENTON MUSSLEWHITE
609 Fannin, Ste. 517
Houston, Texas 77002
(713) 222-2288
Attorney for Petitioners

NO. C-6869

IN THE

SUPREME COURT OF TEXAS

*

GARY ELLIOTT, INDIVIDUALLY
AND AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR,

Petitioners

VS.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Respondents

AMENDED PETITION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

On behalf of GARY ELLIOTT, Individually, and as next friend of SHAUNA MARIE ELLIOTT, A Minor, Petitioners herein, Petition for Writ of Error is sought with respect to Cause No. 10-86-176-CV in the Court of Appeals for the Tenth Supreme Judicial District of Texas at Waco, wherein GARY ELLIOTT, Individually, and as next of friend of SHAUNA MARIE ELLIOTT, A Minor, were

Appellants and Dr. Marcial Lewin and Hillcrest Medical Center were Appellees. As stated above, this instrument is an application for Writ of Error. The attorney for the Petitioners is Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., 609 Fannin, Suite 517, Houston, Texas 77002, (713)222-2288, TBA # 14752000. This Application for Writ of Error is being filed on this 26th day of October, 1987.

* * *

In addition, with respect to subsection a(3), Section 22.001, Petitioners would show that this case involves construction of Rule 215 of T.R.C.P. concerning sanctions dismissals and a construction of various constitutional provisions such as the 5th and 14th Amendments to the Constitution of the United States, involving due process. In particular, this case involves the important question of whether or not Rule 215 allows a

dismissal with prejudice of a case where the plaintiffs have attempted to answer the interrogatories in question; disclosed all the information that they had knowledge of or could reasonably find out; there was no allegation of any prejudice to the defendants which would arise froma refusal to dismiss with prejudice; there were not allegations of any bad faith of contumacious conduct on the part of the plaintiffs or their attorneys; the drastic sanction of dismissal was obtained without defendants first obtaining an order compelling discovery or a specific order of discovery; and there was no showing of any violation of a prior discovery order.

Subsection a(6) of Section 22.001 also supports jurisdicti before the Court because all of the rrors complained of in this case are rrors of substantive law which have tremendous importance to the law of this state. This is true for four primary reasons:

(a). The Court of Appeals incorrectly held that the appeal could not be resolved on the basis of the Transcript even though no evidence was offered at the hearing on sanctions other than the affidavit of counsel for Respondent Hillcrest, which affidavit stated was, according to hillcrest, consistent with the statement of facts contained in its Brief before the Court of Appeals; the Transcript disclosed that no party had alleged bad faith or contumacious conduct on the part of Plaintiffs or that Defendants had been prejudiced, thus the Motions for Sanctions did not support the drastic sanction of dismissal; the Transcript disclosed that no prior discovery order had been issued or violated by Plaintiffs; the Transcript disclosed that Plaintiffs has made a good faith effort to answer the three interrogatory answers complained of; and the Defendants did not dispute Plaintiffs

statement of those facts in their briefs before the Court of Appeals in any material respect.

(b.) In holding, by implication, that the facts of this case justified the drastic sanction of dismissal with prejudice.

(c.) In holding, by implication, that the district court should not have first issued a discovery order or at least resorted to lesser sanctions in view of the fact that no prior discovery order had been violated; good faith effort to comply with the discovery requests had been made; and no prejudice had been shown.

(d). And in holding, by implication, that the district court, in dismissing with prejudice, had not violated the Plaintiffs' due process rights under the U.S. Constitution, particularly the 5th and 14th Amendments.

POINTS OF ERROR

I.

The Court of Appeals erred in failing to decide the matters of the appel on the basis of the Transcript, because no evidence other than an affidavit tendered by the Defendants' counsel was offered at the sanctions hearing, which affidavit Respondents stated was consistent with their statement of the facts in their Brief before the Court of Appeals; the Transcript conclusively established that the action of the district court in granting the ultimate sanctin of dismissal with prejudice was erroneous; the "pleadings" (motions for sanctions) of the Defendants, which were in the Transcript, did not allege sufficient grounds for the granting of the ultimate sanction; and the Defendants, in their Briefs before the Court of Appeals, did not contradict the Plaintiffs' statement of the facts in their Brief on appeal in any material respect. (Germane to assignments of Error Nos. I, II, III and IV of Motion for Rehearing.)

II.

The Court of Appeals erred in impliedly upholding the action of the district court in granting the most drastic sanction of all, dismissal with prejudice, because no bad faith or contumacious conduct had been alleged or shown; no prejudice to Defendants has been alleged or shown; Plaintiffs respo ded in good faith to the interrogatories in question, to the best of their ability to do so; Plaintiffs attended all arings set by the district court; the case was not set for trial; and

Defendants had not attempted, prior to seeking dismissal, to have the district court determine whether the Plaintiffs should be ordered to take any further action with respect to the three interrogatories which Plaintiffs had attempted to answer but Defendants still complaed of. (Germane to Assignments of Error Nos. III, IV and V of Motion for Rehearing.)

III.

The Court of Appeals' implied decision, upholding the district court's dismissal with prejudice, erroneously permits the violatinof Plaintiffs' constitutional rights, particularly their rights under the 5th and 14th Amendments to the Constitution of the U.S. (Germane to Assignment of Error No. IV. of Motion for Rehearing.)

* * *

(3). Finally, if Rule 215 permits the drastic sanction of dismissal with prejudice to be applied to the facts of this case it is unconstitutional.

As Judge Kilgarlin stated in St. Mary's Law Journal, 795 and 796:

"Even if fair notice and hearing are given, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in Insurance Corp of Ireland v. Companies des Bauxites de Guinee articulated due process requirements that seem applicable to

disocvery sanction orders in general. Compagnie des Bauxites, it is submitted, holds for a sanctin decree to pass constitutional muster it must be just, and be specifically related to the harm done by the condemned conduct. The first standard merely requires that in the circumstances of the particular case the trial court did not abuse its discretion. The second standard requires that the remedy for the subject discovery aubse be tailored to redress the resultant prejudice to the other party. Examination of the sanctions authorized by Rule 215 (2)(b) must be made with these due process concerns in mind." (Emphasis ours).

These due process requirements are affirmed throughout the federal and Texas cases. See *Affanato v. Mel Brothers, supra; Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338 (8 Cir. 1975) (see discussion under headnote 5); *Insurance Corp. of Ireland v. Compagne des Bauxites de Guinee*, 456 U.S. 694 (1982); *Hovey v. Elliott*, 147 U.S. 407 (1897); *Hammond Packing Co. v. Arkansas, supra; Societe Internationale v. Rogers, supra; Luep v. Tewell*, 572 S.W.2d 102 (Ct. of App.); *Plodzik v. Owen Fiberglass Corp.*, 549 S.W.2d 52 (Ct. of App, Austin 1977);

Phillips v. Vinson Petroleum Supply Co., (the Court there stating that "we find that the Judge, in not giving notice as required by Rule 168 or providing a hearing concerning the specific nature of the deficiencies and an opportunity to make necessary corrections, deprived the Appellant of due process and abused his discretion in failing to utilize other remedies available to him to assure complaince with the order", 581 S.W.2d at p. 792.); and *Sears Roebuck & Co. v. Holingsworth, supra.* Indeed, as stated in *Insurance Corp. of Ireland v. Compagne de Bauxities,* Rule 37, of the F.R.C.P., establishes the outer limits of the constitutional restrictions upon sanctions orders. Ths, evenif an order complies with Rule 215 of the T.R.C.P., as construed by the district court in this case, it violates the due process clause of the Constitution of the United States if it nevertheless violates Rule 37 of the

F.R.C.P. This becomes important because Rule 37 of the F.R.C.P. and the cases construing it, mandates that the Court have a hearing on any alleged deficient answers and issue a discovery order prior to issuing any sanctions, particularly the sanction of dismissal with prejudice. Unless such order is issued and violated, the sanction of dismissal with prejudice violates the Constitution, as the cases clearly hold under Rule 37. Therefore, it is quite possible that the statement in Rule 215 that a court can impose sanctions (including, impliedly, the ultimate sanction) witout first issuing such a discovery order, vioaltes the Constitution of the United States.

CONCUSION AND PRAYER

We respectfully suggest that grant of Writ of Error in this case is vital to the continued efficacy of Rule 215. We state once again that the Court should provide the district courts with more definite

parameters to guide them in the future in the use of their discretion under Rule 215.

Most certainly, under the applicable law, particularly the Supreme Court decisions, regardless of what the proper construction of Rule 215 is, the order of the district court in this case violates the constitutional rights of Mr. Elliott and his minor daughter and therefore must be reversed. This is particularly true in view of the undisputed procedural facts that the Petitoners attempted in good faith to answer all the interrogatories to the best of their ability to do so; they at not time violated any prior order of the Court; the district court did not issue any order prior to the dismissal; and there was absolutely no prejudice inflicted upon the Defendants by any delay in filing the answers to interrogatories 9, 10 and 22. ....

* * *

WHEREFORE PREMISES CONSIDERED, Petitioners pray this Court grant Writ of Error and upon hearing reverse and remand this case to the District Court for trial on ther merits.

Respectfully submitted,

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TBA # 14752000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Petition for Writ of Error was served upon all attorneys of record, by Certified Mail, Return Receipt Requested or by hand delivery, on this 26th day of October, 1987.

Benton Musslewhite

APPENDIX W

NO. C 6869

IN THE

SUPREME COURT OF TEXAS

*

GARY ELLIOTT, INDIVIDUALLY
AND AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR

Petitioners

VS.

DR. MARCIAL LEWIN AND
HILLCREST BAPTIST MEDICAL CENTER

Respondents

*

MOTION FOR REHEARING AND RECONSIDERATION
OF PETITION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW, the Petitioners and move the Honorable Court for a rehearing and reconsideration of the Petitioner's Petition for Writ of Error and for such Motion would show:

I.

Petitioners admit technically they were

late in filing answers to Respondents' interrogatories. But is is undisputed that they were filed, about seven months before the sanctions hearing in questin was conducted. Between the date they were filed and the sanctins hearing, that seven month period, *only* the following happened:

(a). The Respondents complained of only three interrogatory answers.

(b). The Petitioners made it further clear that ehy simply did not know the answers to two of the interrogatories and supplemented their answers to the third by listing the specific acts of negligence (even though the third - was a question askng for Plaintiffs' specific grounds of negligence - was premature and should have been handled by a hearing on special exceptions and Plaintiffs were about to take the depositions of the doctors and hospital personnel, which would have enabled Plaintiffs to accurately list the specific acts of negligence).

(c). Petitioners adequately explained the delay in answering the interrogatories - the adult Petitioner was in the state penitentiary all through the litigaton and it had been difficult to get the answers completed.

(d). Respondents attempted no further discovery.

(e). Respondents did not ask for a hearing to determine whether the three interrogatory answers were inadequate and no such hearing was held.

(f). The Court had not set any discovery deadlines.

(g). The case was not set for trial.

(h). The Court had issued no discovery orders of any kind.

(i). No motion to compel had been filed and no order to compel had been issued.

(j). The Petitioners had not missed any hearings and attended the sanctions hearing in question.

(k). Petitiors filed a written

response to Respondents' Motion for Sanctions.

(l). Petitioners had noticed and scheduled the depositions of the Defendant Doctor and Personnel at the Defendant hospital.

(m). Petitioners had (in their response) agreed to a self-imposed deadline - even though none had been imposed by the Court - of providing Respondents with the names of their experts.

(n). Nothing ***else*** - but the alleged failure to answer interrogatories constituted the basis for the Respondents' Motion for Sanctions and, as stated above by the time of the sanctions hearing, Petitioners had answered ***all*** but two of the interrogatories and did not answer those because they ***simply did not know the answers to the questions asked.***

(o). ***All of the foregoing was indisputably established in the Transcript***

before the Court of Appeals. The Transcript was certified as complete by the Clerk. See Transcript.

* * *

III.

Thus, with these undisputed certainties, it is clear that the Writ of Error should be granted, and at the least a per curiam decision entered, for the following reasons:

(a). The pleadings (Motion for Sanctions) were limited to a request for sanctions based *solely* upon the alleged failure to answer the interrogatories, which interrogatories, and the answers thereto, were in the Transcript. Therefore, the action of the District Court was limited to the allegations in the motions and, since those allegations, as a matter of law, did not support the snactin of dismissal (considering that answers were filed as established by the Transcript), the Court of Appeals did not

need a statement of facts in order to consider the merits of the appeal and to reverse. **Weatherell v. Weatherell**, 403 S.W.2d 347 (Ct. of App., Houston 1966); **McEntire v. McEntire**, 706 S.W.2d 347 (Ct. of App. 1986); **DeGarcia v. San Antonio & S.P. Ry. Co.**, 77 S.W. 275 (Ct. of App., San Antonio, 1915; writ ref.); 4 Tex. Jur. 3d, Sect. 349, at pp. 479, 480, and the cases there cited. See also pp. 22, 27 of Petition for Writ of Error.

(b) The briefs before the Court of Appeals established that there was no dispute about the material "facts" and that all of such material "facts" were contained in the Transcript. Thus, the Court of Appeals did not need a statement of facts in order to consider the merits of the appeal and to reverse. **Whatley v. Whatley**, 493 S.W.2d 299 (Ct. of App., Dallas, 1973); **Sarri v. Christie**, 217 S.W.2d 99 (Ct. of App., Dallas 1949); **Johnson v. Texas Board of Chiropractic**

Examiners, 449 S.W.2d 145 (Tex. Civ.App. Amarillo 1969, no writ); City of Houston v. Lakewood Estates, Inc., 429 S.W.2d 938 (Tex Civ App., Houston 1st Dist., 1968, writ ref'd n.r.e.); American Security Life Ins. Co. v. M. D. Anderson Hospital and Tumor Institute, 408 S.W.2d 155 (Tex. Civ. App., Houston 1st Dist. 1966, writ dismissed); Rancher v. Franks, 269 S.W.2d (Tex. Civ.App. Fort Worth 1954, no writ) and see pp. 20-22 of Petition for Writ of Error.

(c). The District Court's order by limiting the grounds for dismissal to discovery abuse, which in turn necessarily turned on the discovery requests in the Transcript, could be considered on its merits *solely* from the Transcript, without a statement of facts, and the Court of Appeals should have reversed on the basis of the terms of the order, in the light of the Transcript, because the order and the Transcript did not support the drastic

sanction of dismissal, see pp. 23-25 of Petition and the cases there cited.

(d). The failure to consider the Petitioners' appeal on its merits constituted a violation of the Rules of Civil and Appellate Procedure, the Texas Constitution, the United States Constitution and existing case law.

(e). On the merits, resort to the drastic sanction of dismissal violates Rules 215 and other rules of the Texas Rules of Civil Procedure and existing case law.

(f). If such action does not violate Rule 215 T.R.C.P. by permitting dismissals where answers to interrogatories have been filed, where no prior order of discovery has been violated, where and when there is no allegation of bad faith of contumacious conduct - then either Rule 215 is unconstitutional under the Constitution of the United States or the dismissal is, in itself, a deprivation of due process and

thus a violation of the United States Constitution. See **Societe Internationale Pour Participations INdustrialies v. Rogers**, 357 U.S. 199 (1958).

What the bottom line is in this case is whether this Court, the highest court of our state, is going to tolerate the stripping of the minor child's sacred rights to a trial by jury simply because, throught no fault of her, her only surviving parent is incarcerated int he state penitentiary and thus unable to respond to interogatories expeditiously and to answer two questions which he did not know the answers to and, because he was incarcertated, could not go out and try to find out the answers to those two questions. That is the sum and substance of all that the District Court - based upon the Motions for Sanctions, the Transcript and its own order - could possibly have based its **dismissal with prejudice on.**

* * *

WHEREFORE, we pray this Court to right this terrible wrong and rehear and reconsider the Petition for Writ of Error in this case and grant such Petition or enter a per curiam opinion ordering the Court of Appeals to consider the appeal on its merits.

Respectfully submitted,

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